

1
2
3 COSTCO WHOLESALE CORPORATION,

4 Plaintiff,

5 No.

6 v.
7 DEPARTMENT OF THE ARMY,
8 and
9 CHRISTINE WORMUTH, in her capacity
as Secretary of the Army,
10 Defendants.

11
12 Plaintiff Costco Wholesale Corporation (“Costco”) hereby complains and alleges
13 the following against Defendants Department of the Army (“Army”) and Christine
14 Wormuth, in her official capacity as Secretary of the Army, (collectively “Defendants”):
15
16 **Nature of Action**
17
18 1. This is an action for declaratory judgment and injunctive relief under the
19 Administrative Procedures Act (5 U.S.C. § 701 et seq.) (“APA”), arising from
20 Defendants’ refusal to comply with Costco’s SF-180 and properly issued *Touhy* request
for discovery from the Army and the National Personnel Records Center. Costco is a
21 named defendant in an action currently pending in the Superior Court of Washington in
King County, captioned Samantha Spry v. Costco Wholesale Corporation, Case No. 19-
2-14927-2 (the “Underlying Action”).

22
23 COMPLAINT - 1

24 WINTERBAUER & DIAMOND PLLC

25 7683 SE 27th St. #495
26 Mercer Island, Washington 98040
27 Telephone: (206) 676-8440

Jurisdiction and Venue

2. This Court has subject matter jurisdiction over this action as a Federal
Question under 28 U.S.C. §1331 and separately under 5 U.S.C. §701 et seq.

3. Venue is proper in this district under § 28 U.S.C. 1391(b) and/or (c) because a substantial part of the events giving rise to this claim occurred within this district and under 28 U.S.C. § 1391(e)(1) as the defendants are an officer and agency of the United States.

Parties

4. Plaintiff Costco operates cash and carry membership-based “warehouse” stores, which sell merchandise to businesses and individual members. It is the defendant in the Underlying Action.

5. Defendant Army is an agency of the United States. Samantha Spry (plaintiff in the Underlying Action) served in the Army from approximately September 2000 to July 2002 under the name Jordan Spry.

General Allegations

6. On or around September 11, 2020, Costco through its counsel provided an SF-180 request for records to the Army seeking Ms. Spry's service records as related to an underlying action brought by Ms. Spry against Costco. The request sought all records, including relevant medical, disciplinary, and other records. These records relate to Ms. Spry's underlying claims of emotional distress as well as allegations by Ms. Spry as to the reasons for her discharge from the Army. The SF-180 was signed by Ms. Spry and completed with all information available, including Ms. Spry's dates of service, social security number, and date of birth.

1 7. It has been over a year since that request was issued. No response was
2 ever received to this request.

3 8. On or around September 7, 2021, Costco through its counsel asked that
4 Ms. Spry submit a request for her own records through the eVetRecords service in the
5 hope that it would expedite the process. On information and belief, she did so, but
6 received only a DD-214 form.

7 9. On or around September 9, 2021, Costco through its counsel also served a
8 Touhy request on the National Personnel Records Center, which on information and
9 belief is the custodian of such records. A true and correct copy of this request is attached
10 as Exhibit 1. This request was delivered on or about September 14, 2021. This request
11 included the signed SF-180 form and identified the relevant laws and regulations. This
12 request also included statements that no testimony would be required, there was no
13 alternative source of the information other than these records, and that neither the United
14 States nor its agencies are, or are expected to be, parties to the underlying lawsuit. This
15 request demanded production of the documents

16 10. On or around September 30, 2021, Costco received a signed release
17 allowing its counsel to request the records through the eVetRecords service directly. On
18 October 1, 2021, Costco through its counsel attempted to do so, but the service produced
19 an error message stating that the request could not be completed. On October 4, 2021,
20 Costco's counsel again used the eVetRecords service to request her full service records,
21 but this time completed all the forms as though it was Ms. Spry herself (with permission
of Ms. Spry's counsel). At the time of this filing the request has not been processed.

22 11. The Underlying Action is currently set for trial on January 24, 2022.

COUNT ONE

Declaratory and Injunctive Relief under the Administrative Procedures Act, 5 U.S.C. § 701, et seq.

12. Costco incorporates the allegations of paragraphs 1-11 by reference as though fully stated herein.

13. Costco has followed the Army's guidelines on requesting documents and has complied, through the completed SF-180 and additional releases.

14. Neither the Army nor the National Personnel Records Center have responded to Costco's request.

15. Costco has demonstrated a compelling need for the information and good cause to produce the same. Specifically, this information is directly relevant to the claims in the Underlying Action and the information is not available from any other source.

16. The Army and the National Personnel Records Center have improperly refused to provide documents and have not provided a reason or even a statement that it is refusing to cooperate. This refusal to act is an arbitrary and capricious agency decision.

17. As a result of this arbitrary and capricious refusal to cooperate, Costco has been unfairly prejudiced in its defense in the Underlying Action.

PRAYER FOR RELIEF

Costco respectfully asks this Court to:

18. Declare that under the Administrative Procedures Act, 5 U.S.C. § 701, *et seq.*, the Army's and/or the National Personnel Records Center's refusal to properly comply with Costco's record request was arbitrary and capricious;

19. Order that the Army and/or the National Personnel Records Center provide documents in compliance with Costco's request;

20. Enjoin the Army and/or the National Personnel Records Center from any further refusal to cooperate with Costco's requests for discovery in the Underlying Action;

21. Provide such other relief as the Court may deem just and proper, including costs associated with this Complaint and attorneys' fees.

DEMAND FOR HEARING

Costco hereby demands a hearing on the merits of this Complaint brought pursuant to the Administrative Procedures Act, 5 U.S.C. § 701, *et seq.*

Dated this 12th day of October, 2021.

WINTERBAUER & DIAMOND PLLC

s/ Steven H. Winterbauer
Steven H. Winterbauer, WSBA #16468
Nicholas Gillard-Byers, WSBA #45707
7683 SE 27th St. #495
Mercer Island, WA 98040
206-676-8440
mail@winterbauerdiamond.com
Attorneys for Plaintiff
Costco Wholesale Corporation